IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
2013-12-20	
DATE	**SIGNATURE**

CASE NUMBER: 7457/13

DATE: 20 December 2013

ABSA BANK LIMITED — APPLICANT

V

HAMMERLE GROUP (PTY) LTD — RESPONDENT
(formerly Clidet No 773 (Pty) Ltd)
(Reg. no 2007/018552/07)

JUDGMENT

MABUSE J:

[1] This matter conflates three applications, one an application for rectification of a Loan Agreement, the second one an application in terms of the provisions of sections 344 and 345 of the Companies Act 61 of 1973 for the liquidation of the respondent and the third and final one an application to strike out certain paragraphs of the founding affidavit, an annexure to the founding

affidavit and a certain subparagraph of the replying affidavit.. The application for the winding-up of the respondent is brought under two grounds, firstly, that the respondent is commercially insolvent, and secondly, that it is unable to pay its debts and will be unable to pay future debts.

[2] The applicant is a registered bank and a public company duly registered in accordance with the relevant company statutes of this country with its principal place of business located at 15 Troye Street in Johannesburg. It is represented in this matter by its manager in the Commercial Asset Finance Division who, in that capacity, manages the respondent's account pertaining to a Loan Agreement. He is duly authorised to provide this affidavit for the purposes of this application. The respondent, formerly known as Clidet no. 773 (Pty) Ltd, is also a company duly registered with limited liability in accordance with the company statutes of this country and has its principal place of business and registered office situated at 25 Industrial Crescent, Bronkhorstspruit. The respondent conducts business as a manufacturer of steel and plastic products.

[3] The applicant contends that as at 31 May 2011, the respondent was indebted to it in the aggregate amount of R21,005,197.46 computed as follows:

3.1 A sum of R4,693,437.78 arising out of an advance by the applicant of R4,000,000.00 to the respondent pursuant to a written Loan Agreement and a Notarial Bond.

3.2 A further sum of R16,311,759.68 arising from an advance by the applicant of R10,000,000.00 to the respondent following a Subscription and Shareholders Agreement ("the Shareholders Agreement") between the applicant, Mfiso Investments (Pty) Ltd ("Mfiso") and Uwe Christian Hammerle ("Hammerle") dated 19 November 2007 plus interest reckoned from 4 July 2011.

[4] THE LOAN AGREEMENT

On 6 December 2007 and at Johannesburg, the applicant and the respondent concluded a written Loan Agreement in terms of which:

4.1 the applicant undertook to advance a sum of R4,000,000.00 to the respondent subject to the terms of the Loan Agreement;

4.2 the capital amount of R4,000,000.00 was refundable in sixty (60) equal monthly instalments of R96,045.70 each commencing on 1 January 2008 and thereafter on or before the 1st day of each and every succeeding month until full payment of the capital amount plus interest;

4.3 that the capital advanced was to bear interest at 15.5% computed monthly in arrears.

4.4 that the said interest was to be paid on the last business day of the month following the month commencing on 6 December 2007;

4.5 that for all intents and purposes a certificate signed by the manager of the applicant stating the indebtedness of the respondent to the applicant in respect of the loan, the prime rate or any other amount of

indebtedness in terms of the Loan Agreement would be sufficient proof of the matters stated therein;

4.6 that in the event of the respondent defaulting with payment of any amount on the due date or in the event of the respondent being placed under provisional or final liquidation or sequestration or the provisional or final judicial management, the applicant may by written notice to the respondent, declare all or any part of the loan to be immediately due and payable ("escalation"), upon which the respondent would pay the aggregate of all the amounts lent in advanced to it, with interest.

[5] On 13 December 2007 following a special power of attorney executed on behalf of the respondent a Special and General Notarial Covering Bond ("the bond"), was registered in favour of the applicant by the respondent as the borrower in order to secure the debt. The said bond provided, among others, that:

5.1 "*And the appearer declares that whereas by virtue of an agreement entered into with Absa Bank Ltd ("the Bank") the mortgagor has become indebted to and/or will from time to time become indebted to Absa Bank Ltd (hereinafter referred to as the Bank) which indebtedness arose and will arise from one or more of the hereinafter mentioned causes:*

And whereas the Bank required the indebtedness of the mortgagor to be secured by the amount of hereinafter mentioned capital sum

together with interest thereon as hereinafter set out by means of reason of this bond;

5.2 *the mortgagor is truly and lawfully indebted and firmly bound unto any favour of the bank its order and assigns and the security confirmed by this bond to the bank shall be in the sum of R4,000,000.00 hereinafter revert to as the capital sum originating arises from one or more of the causes or causal hereinafter referred to together with interest thereon at such rate as the Bank in the manner hereinafter referred to may determine from time to time, which capital shall together with interest thereon the mortgagor promised and undertook to pay to the bank on demand under renunciation of the benefits arising from the legal exceptions .... and the mortgagor under renunciation of the benefits of the abovementioned legal exception is truly and lawfully indebted and held and firmly bound unto in favour of the Bank in the further sum of R800,000.00 in respect of costs and similar causes as specified."*

5.3 Pursuant to clause 2 of the said bond the respondent bound certain of its movable assets specially and generally as security for its obligations to the applicant. The assets that the respondent specially bound for security to the applicant are those listed in Annexure "A" to the bond;

5.4 The movable property that was generally pledged included all movable property and effects of the mortgagor wheresoever situated, nothing excepted including stock-in-trade and claims receivable of the mortgagor; all the rights to trade names and trademarks of the mortgagor; all equipment, all electronic equipment, fixtures and fittings,

office furniture, plant machinery, motor vehicles, goodwill and claims to book debts and those such as the mortgagor now has or may in future become possessed of nothing excepted;

5.5 Furthermore it was contended by respondent in the said Bond that any certificate signed by the manager or accountant of any branch of the applicant would for all intents and purposes be *prima facie* proof of:

5.5.1 Any amount debited in respect of interest as well as all rates of interest as may be determined by the applicant from time to time;

5.5.2 The amount which may at any time be owing by the respondent to the applicant and which may be secured under the Bond. It is contended by the applicant that the bond was executed and registered simultaneously with the Loan Agreement and that its purpose was clearly to secure the obligations of the applicant under the Loan Agreement. It is furthermore contended by the applicant that the bond itself created an independent obligation and cause of action on the respondent to repay the sum of R4,000,000.00 plus interest and cost to the applicant.

[6] During December 2007 the applicant had duly advanced to the respondent the said amount of R4,000,000.00.

[7] THE SUBSCRIPTION AGREEMENT

In order to enable the respondent to fund the acquisition of the respondent's business and assets the applicant, the respondent, Mfiso and Hammerle concluded a Subscription Agreement whose material terms were as follows: Shareholding is as follows: Mfiso 70 ordinary shares 70%; Hammerle 30 ordinary shares 30% and the applicant 10 preferent shares. Following the aforementioned Subscription Agreement on 16 October 2007 the applicant agreed to lend and advance to the respondent a loan in the amount of R10,000,000.00. The said amount of R10,000,000.00 was refundable to the applicant by the respondent at prime rate plus 1% compounded monthly in arrears; the Subscription Agreement was subordinated to claims of all other creditors. It was furthermore agreed between the parties that in the event of a default and failure by the respondent to remedy any breach within 30 days of a written notice requiring the breach to be remedied, the applicant would be entitled, in terms of clause 11.4 thereof, to request immediate full repayment of the Absa loan notwithstanding the provisions of this agreement. During December 2007 the applicant duly advanced the amount of R10,000,000.00 to the respondents in accordance with the provisions of the Subscription Agreement.

[8] The applicant contends that the respondent failed to pay the monthly instalment of R96,045.70 under the Loan Agreement and thereby defaulted in its obligations. It was contended furthermore on behalf of the applicant that at the time of the launching of this application the respondents was in arrears for 53 months and that the total amount in arrears at that stage was

R5,041,214.68. As a consequence of the respondent's failure to comply with its obligations in terms of a Loan Agreement on 24 November 2009, the applicant's legal representatives sent a letter to the respondent in which letter the respondent was reminded that it was indebted to the applicant in respect of an overdraft amount in the sum of R615,319.66 plus interest at a rate of 10.5% reckoned form 1 July 2009 and furthermore that the respondent was indebted to the applicant in another amount of R3,619,257.32 plus interest. Reference in the said letter was made to the respondent's obligations and the plaintiff's rights arising from the General Notarial Covering Bond. In paragraph 5 of the said letter the respondent was expressly informed that the overdraft facility had lapsed and the instalments of the other facilities were in arrears and therefore the aforementioned amounts were due and payable. It needs to be mentioned though that the sum of R615,319.66 was a separate debt not in any way connected to the loan agreement. It was contended furthermore by the applicant that on the same date, that is 24 November 2009 the respondent's representative signed the document on behalf of the respondent and in that manner acknowledged the respondent's indebtedness as well as the respondent's obligations to turn over to the applicant the mortgaged assets. The applicant regarded the letter dated 24 November 2009 from his attorneys to the respondent as being an acceleration of the payment of the loan after the respondent's default, in accordance with the terms of clause 10.2 of the Loan Agreement.

[9] On 28 May 2010 the applicant brought a formal application against the respondent in the South Gauteng High Court under case number 19855/2010 to perfect the bond. The applicant contends furthermore that it regarded the said application as an acceleration of the debt in accordance with clause 10.2 of the Loan Agreement.

[10] On 8 July 2010 Capital Acceptance Ltd brought an application for leave to intervene in the perfection application on the basis that it was the owner of certain of the movable assets of the respondent. On 10 August 2010 a further application for leave to intervene in the perfection application was made by Kingship (Pty) Ltd ("Kingship") and Hammerle, the director and shareholder. In this second application Hammerle also alleged that he was the sole director and shareholder in Kingship. He provided an affidavit in support of the said application for leave to intervene. In this affidavit he asserted that the bulk of the assets that were specially pledged to the applicant in terms of a Notarial Bond were not in fact the property of the respondent but that they belonged to Kingship or himself personally. Hammerle and Kingship therefore maintained that the applicant could not perfect its security over these assets as they did not constitute the property of the respondent. It is consequently on the basis of both these claims by Capital Acceptance Ltd and Kingship and Hammerle that the applicant contends that the respondent's liabilities exceeded its assets.

[11] Apart from the funds that the applicant advanced to the respondents in terms of the aforementioned Loan Agreement and Subscription Agreement, the applicant contends furthermore that it advanced further funds to the respondent on the basis of an overdraft facility. According to the applicant as at 31 March 2010 the amount outstanding in respect of the debit balance on the respondent's cheque account was R672,793.14. The debt amount was due and payable on demand and the applicant accordingly, through its attorneys, demanded payment of the said money on 21 January 2010. It is important to note at this stage that the said amount was paid by the respondent to the applicant and the applicant has conceded that indeed that is the case.

[12] By May 2010 the respondent was not only in default of its obligations to the applicant under the Loan Agreement but it had also defaulted in its payment obligations to the applicant under the Subscription Agreement within one month after it was finalised and had made only one payment since that date of 4 November 2008.

[13] On 21 January 2010 the applicant addressed a letter to the respondents in terms of the provisions of sec. 345 of the Companies Act 61 of 1973. It required the respondents to pay a sum of R653,279.60 in respect of a facility agreement. It demanded for payment of the outstanding full amount of R653,279.60 plus interest then within 10 days of 21 January 2010. It also indicated in paragraph 5 that the same letter served as a demand in terms of

sec. 354 of the Companies Act and that if the respondent did not pay the said amount within the stipulated period of 21 days the respondent would be deemed in accordance with the provisions of section 344 of the Companies Act, to be unable to pay its debts and on that basis it would be liable to be liquidated. It is clear both this letter and also in paragraph 46 of the founding affidavit that the target of this letter was the overdraft claimed and that overdraft has been paid. The overdraft is not an issue between the parties.

[14] On 7 June 2011 the applicants, through their attorneys, sent a letter to the respondent in terms of the provisions of sec. 345 of the Companies Act 61 of 1973. This letter constituted a demand for payment of the Loan Agreement in the amount of R4,693,437.38 plus interest at a rate of 11% per annum calculated from 1 June 2011 to date of payment. It was stated in paragraph that as security of company's obligations in terms of the Loan Agreement a company registered as Special and General Notarial Covering Bond in favour of the applicant for the amount of R4,000,000.00 plus an additional amount of R800,000.00 in respect of the cost and similar costs. In paragraph 5 of the said letter the applicant's attorneys warned the respondent that if they did not receive payment within three weeks after the date of service of the said letter of demand, the company would be deemed, in terms of the provisions of sec. 344 and 345 of the Companies Act 1973 read with sec. 9 of Schedule 5 of the Companies Act 71 of 2008, that the respondent was unable to pay its debts and that the applicant would then apply for liquidation of the company.

[15] On 11 July 2011 another letter in terms of the provisions of sec. 345 of the Companies Act in which payment of the amount of R4,693,437.38 plus interest was demanded was sent to the respondent. It is important to note the following that in the said letter in paragraph 4 they stated that:

"*Pursuant to the provisions of the Loan Agreement, Absa advanced an amount of R4,000,000.00 to the company. The capital amount was to be paid in 60 equal monthly instalments of R96,045.70 commencing on 1 January 2008. Interest at a rate of 15.5% per annum calculated in arrears was payable on the last business day of the month following the month in which interest accrued commencing on 6 December 2008.*

The company has failed to make payment of the capital instalments or interest since 3 June 2009."

[16] Again in paragraph 8 the respondent was warned that if it did not make payment of the aforementioned amount within three weeks after the date of delivery of that letter of demand the company would, in terms of the provisions of sec. 345 of the Act, be deemed to be unable to pay its debts and the applicant would apply for its liquidation. On 24 June 2011 the respondents too through the firm, DNS Attorneys, responded to the applicant's letter dated 7 June 2009. This letter, together with the applicant's paragraph that relates to the said letter, are a subject of an application to strike out. I will, in due course, revert to the said application.

[17] In opposing this application for its liquidation the respondent relies on an affidavit by one Stanley Mngomezulu, its director who had been duly authorised to depose to the said affidavit. In the said affidavit he raised two defences, firstly, that the applicant's claim for payment of the sum of R4,693,437.38 has become prescribed by prescription in terms of the Prescription Act No. 68 of 1969 and consequently this debt has been extinguished. Secondly, he conceded, in his affidavit, that in terms of the Subscription and Shareholders Agreement the applicant had advanced an amount of money to the respondent in terms of a Subscription Agreement subordinated in favour of the respondent's creditors. He contended, however, that as at the time he made that affidavit the respondent was indebted to its other creditors in the sum of R2,205,657.07 and consequently that the amount owed by the respondent to the applicant was not due and payable. He also denied that the respondent was unable to pay its debts.

[18] In order to succeed with its application against the respondent, the applicant must establish *locus standi*. This is done by showing that the applicant is a creditor of the respondent in an amount of at least R100.00 in terms of the provision of sec. 345 of the Companies Act 61 of 1973. Secondly, that the respondent is unable to pay its debts or that its liabilities exceed its assets. If the applicant fails to prove that the respondent owes it at least R100.00 or that it is the respondent's creditor in the sum of at least R100.00 it will not avail the applicant to prove that the respondent is unable to pay its debts or its assets exceed its liabilities.

[19] The applicant contends that the respondent is indebted to it in the aggregate sum of R21,005,197.46, R4,693,437.78 being in terms of a written Loan Agreement concluded between the parties and which was subsequently secured by a covering bond and a further sum of R16,311,759.68 which arose from a written Subscription and Shareholders Agreement dated 17 November 2007. With regard to the sum of R4,693,437.78 arising from the written Loan Agreement it was denied by the respondent that it is indebted to the applicant in respect of the said amount. The respondent's defence is that the applicant's claim has been extinguished by prescription. If this Court should find that the defence is valid, it will also find therefore that the applicant has no *locus standi*.

[20] I now turn to the question regarding whether or not the applicant's claim arising from the Loan Agreement has prescribed. The Prescription Act 68 of 1969 regulates the prescription and in particular the periods of prescription of debts. In this regard sec. 11 reads as follows:

"*The period of prescriptions of debts shall be the following.*

(a) 30 years in respect of –

(i) any debt secured by a mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the state in respect of any share of the profits, loyalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the state and arising ...

(c) six years in respect of any debt arising from a negotiable instrument or notarial contract unless a longer period appears under paragraphs (a) and (b);

(d) three years in respect of any other debt unless specially provided otherwise by statute."

[21] According to the Loan Agreement, the amount of loan was refundable in instalments of R96,045.70 with effect from 1 January 2008 and thereafter on or before the 1st day of each and every succeeding month until full payment of the capital plus interest. However, clause 10.2 of the agreement provided that in the event of default, the applicant may, by written notice to the respondent, declare all or any part of the loan to be immediately due and payable. This is called acceleration of payment of the full amount lent and advanced. This the applicant did in his letter dated 24 November 2009 when it demanded from the respondent full payment of the whole amount. The applicant has submitted that the letter of 24 November 2009 constituted an acceleration of the payment of the whole amount of R4,000,000.00 plus interest in accordance with the provisions of clause 10.2 of the said Loan Agreement. Accordingly prescription with regard to the payment of the said amount commenced to run on 24 November 2009. It ran for a period of 3

years. During this period it was never interrupted. In the result the applicant's claim with regard to the amount set out in the Loan Agreement has become prescribed.

[22] The applicant disputes the respondent's contention that the debt arising from an agreement of loan has become prescribed. It contends, on the contrary, that the loan agreement was secured by a Special and General Notarial Bond and that as a consequence thereof an applicable period of prescription in terms of s.11(a)(i) of the Prescription Act 68 of 1969 ("the Act") is 30 years. In the alternative, the applicant contended that a 6 year period referred to in s.11(c) of the said Prescription Act applies in respect of all bonds which are attested by a notary, such as notarial contracts but which are not passed over immovable property. In addition the applicant contends that on 1 February 2009, the respondent paid the applicant a sum of R103,132.43 thereby acknowledging its liability to the applicant. Payment of the said amount by the respondent constituted, according to the applicant, an interruption of the running of prescription.

[23] An application for rectification of the loan agreement was granted after the respondent consented to it. It therefore leaves only the other applications to be dealt with by the Court.

[24] THE LOAN AGREEMENT

The loan agreement was secured by a Special and General Notarial Bond.

The applicant disputed the respondent's claim that the loan agreement had prescribed and contended, on the contrary, that because the debt was secured by a Notarial Bond it did not become prescribed and furthermore that the applicable period is 30 years, and in the alternative 6 years. Before dealing with these two periods it is only proper if I deal with the nature of the security, in other words, whether debt that would normally have prescribed after 3 years would not become prescribed simply because it was secured by a Notarial Bond.

[25] It is common cause between the parties that:

(1) a loan agreement between the parties was concluded on 6 December 2009;

(2) the terms thereof are as averred by the applicant and admitted by the respondent;

(3) following the said agreement, a sum of R4 000 000.00, representing the loan was lent and advanced by the applicant to the respondent;

(4) a notarial bond had been registered in order to secure payment of the said amount; and

(5) the respondent has defaulted in its obligations to refund the said sum of R4 000 000.00.

[26] Section 11(a)(ii) deals with the prescription of debts secured by a mortgage bond. The relevant period of prescription is 30 years. In **Lief N.O. v Dettmann 1964(2) SA 252 AD at 259 C** a mortgage bond was defined as:

"*An instrument hypothecating lender property to secure an existing debt or future debt or both existing and future debts.*"

In terms of the provisions of s.50(1) of the Deeds Registries Act 47 of 1937:

"*A mortgage bond shall be executed in the presence of the Registrar by the owner of the immovable property therein described or by a conveyancer duly authorised by such owner by power of attorney, and shall be attested by the registrar.*"

In **Elliot The South African Notary 6th Edition** at page 146, the learned author describe it as follows:

"*(a) The true mortgage bond in the narrow sense of the word referring to a real right of security in an immovable assets of another which is created by registration in the deeds registry by means of a bond which must be prepared and executed before the registrar of deeds by a duly qualified conveyancer.*"

On the other hand Security By Means of Movable Property Act No. 57 of 1993 deals strictly with the hypothecation of movable property. In the preamble it reads as follows:

"*To regulate the legal consequences of the registration of a notarial bond over specified movable property; to exclude the operation of the landlord's tacit hypothecating for purposes of certain movable property; to repeal the notarial bonds (Natal) Act, 1932; to adjust another law in consequence of such repeal; and to provide for matters connected therewith.*"

Section 1 thereof provides as follows:

"*1) If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it that it will be recognisable, is registered, after the commencement of this Act in accordance with the Deeds Registries Act, 1937 (Act 47 of 1937), such property shall –*

(a) .....

(b) notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee."

In deference to the authors of Elliot the South African Notary I again refer to their categorisation of real security on page 147 where they define a notarial bond as:

"*The notarial bond been a general or special bond hypothecating a specific movable asset, or all the movable assets of a debtor and registered in a deeds registry by the registrar of deeds."*

Again s.102 of the Deeds Registries Act 47 of 1937 defines (notarial bond) as:

"*A bond attested by a notary public hypothecating movable property generally or specifically.*"

Counsel for the applicant sought, argued and submitted in his heads that it is apparent that when one has regard to the effect of a notarial bond it is commensurate with the dictionary meaning of a mortgage bond. On that basis he argued that the period of prescription is 30 years as envisaged by the provisions of s.11(a)(i) of the Act. In my view it did not assist his case for the applicant's counsel to seek the definition of a word "bond" in a dictionary when the Deeds Registries Act and many other law literatures define what mortgage bond is and what a notary bond is. His argument that the word "notarial bond" is commemorate with the dictionary meaning of mortgage bond, in my view, lacks merit.

[27] It is clear that a mortgage bond is not a notarial bond. The main attribute of a mortgage bond, and which is lacking in a notarial bond, is the immovable property. Simply put, in a mortgage bond the property hypothecated is an immovable property whereas in so far as it concerns the notarial bond the property involved is a movable property. Accordingly the period of 30 years does not apply to the notarial bond because it is not a mortgage bond. I accept though that in terms of s.11(b), if it be proved that the debt arises from a notarial contract the applicable period of prescription is six (6) years.

[28] The respondent has not challenged the validity of the notarial bond. It was argued on behalf of the respondent by its counsel that in so far as it regards the notarial bond, a creditor only acquires the rights to the movable property once the bond has been perfected or once there has been delivery of the

movable property to the creditor. He developed his argument and stated that there was no valid notarial bond as neither of the two had happened. This argument, in my view, does not have any substance for s.1 of Act 57 of 1993 provides that:

"*If a notarial bond hypothecating movable property specified and described in the bond in a manner which renders it readily recognizable, is registered after commencement of this act in accordance with the Deed Registries Act, 1947 (Act 37 of 1947), such property shall be, notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee effectually as if it had expressly been pledged and delivered to the mortgage bond.*"

In other words, in order to constitute a valid hypothecation of movable property it is no longer a requirement of the law that the mortgagee should receive actual delivery of the movable property hypothecated. See **Dorbyl v Northern Cape Tours and Charter Services CC 2001(1) ALL SA 118 NC at page 137 paragraph 21.2**, see also **Bokomo v Standard Bank SA Bpk 1996(4) SA 450(C) at 454 D-E**. Accordingly delivery of the encumbered movables is not a necessity in order to constitute a valid notarial bond since in terms of the provisions of s.11 of Act 37 of 1993 the mortgagee is in reality a mere fictional possessor of such goods. See also **pages 147 to 148 of Elliot the South African Notary** where the learned author states as follows:

"*A pledge as previously stated required the delivery of the movable subject matter of the pledge. A notarial bond does not require the delivery of the asset and accordingly is not a pledge per se.*"

Accordingly the argument by counsel for the respondent that the creditor (mortgagee) only acquires the rights to the movable property once the bond has been perfected or there has been delivery of the movable property to the creditor does not hold water.

[29] I now turn to examining whether the debt on which the applicant relies arises from an agreement of loan or a notarial bond or both of them. It is in my view only apposite that before I deal with this aspect I set out the parties' positions with regard to this aspect. In paragraph 44.3 of its answering affidavit, it was stated by Mr. Ngomezulu, on behalf of the respondent that:

"*In the premises it shall be argued to the above honourable Court that by virtue of the provisions of the Prescription Act the amount claimed arising from the loan agreement ...*"

In the replying affidavit Mr. William Henry Edward Gertenbach for the applicant merely stated in paragraph 22 that:

"*It is admitted that the full outstanding amount is due and payable. The interpretation in respect of prescription is however denied.*"

He did not dispute part of the statement by the said Ngomezulu in paragraph 44.3 that:

"The amount claimed arising from a loan agreement."

A fact which has not been denied is in practice deemed to have been admitted. Accordingly on the basis of the fact as stated by the respondent together with the facts as admitted by the applicant the Court may accept that the source of the debt on which the applicant relies is the loan agreement. See **Stellenbosch Farmers Winery Ltd v Stellenvate Winery Pty Ltd 1957(4) SA 234(C) at 235.**

[30] In his heads, Mr. Joseph, stated clearly that the indebtedness of the respondent to the applicant arose from the conclusion of the loan agreement and only once the loan was advanced by the applicant to the respondent. I find it opaque that in his heads Mr. Burger did not deal with this aspect at all. In other words, whether or not the loan agreement was the source of the debt on which the applicant relied. Although, for different reasons, it was contended by the applicant's counsel that the debt has not prescribed.

[31] In his head and argument counsel for the respondent referred me to the authority of **Pentz v Government of the RSA 1983(3) SA 584 AD at page 593** where the Court, in dealing with the provision of s.11(c) of the Act stated that:

"If it was not such a debt then it is common cause that the prescribed period was 3 years. The words "a debt arising from a bill of exchange" mean a debt which has its source of origin in a bill of exchange."

[32] See also **Coloured Development Corporation Ltd v Sahabodien 1981(1) SA 868 CPD at 870A** where Rose Innes J, as he then was, stated the following at A-D:

"A general notarial bond comes into existence pursuant to an agreement between a creditor and a debtor to hypothecate movable property as security for a principal debt and, by registration of contract or bond, as it is called, to create a jus ad rem with a right to a general preference for payment of the principal debt upon insolvency of the debtor occurring.

While provisional sentence is claimable by virtue of the liquid document, namely a notarial bond in this case, it is the principal indebtedness evidenced by the bond and acknowledged therein which is the subject of the claim.

The cause of action is the failure to comply with the terms of the principle agreement recorded in the bond as to repayment of the capital and interest of the loan. That cause of action is upon the principal contract of loan to which the rights created by the bond are but accessory and ad securitatem debiti. The creditor cannot claim on a bond unless there is a valid obligation and debt due to him de hors the bond. There can be no settlement or payment of the bond in isolation of and without settlement or payment of the principal obligation acknowledged in the bond. Here that obligation is a loan."

[33] In order to establish the source of the debt on which the applicant relies one merely has to examine the reasons advanced for the application. One merely has to examine the grounds on which it is contended by the applicant that the respondent is unable to pay its debts. The question with regard to this application will inevitably be which debts. In paragraph 34 of the founding affidavit it was stated by the applicant that:

"*The respondent defaulted in its obligation to pay the monthly instalment of R96,045.70 under the loan agreement.*"

At present the instalments are in arrears of 53 months in an amount of R5,641,214.68. The respondent has failed to make any further payments under the loan agreement."

This averment in paragraph 34 was the main reasons the applicant took steps to perfect the bond and more importantly it was the major reason the applicant forwarded a letter of demand in terms of s. 345 of the Companies Act 61 of 1973.

[34] In my view it is as clear as crystal that the debt on which the applicant relies, has its origin in the loan agreement. It is clear that the applicant's cause of action is the respondent's failure to comply with the terms of the loan agreement regarding the repayment of the capital advanced and interest chargeable on the loan. Since the debt did not arise from the notarial bond

but from the loan agreement it became due and payable on 24 November 2009. The prescription period that applied to it was therefore three (3) years. Prescription of the debt began to run on 24 November 2009 and it did so for three years, at the end of which the debt was extinguished by prescription. Once the debt has become prescribed the applicant ceased to be a creditor of the respondent.

34.1 An examination of some of the clauses of the notarial bond will show that the source of the respondent's indebtedness was the loan agreement and not the notarial bond. Firstly, and as correctly pointed out by the respondent's counsel, the preamble of the notarial bond states that the respondent "by virtue of an agreement entered into with the applicant has become indebted to and/or will from time to time become indebted to the applicant which indebtedness arose and/or will arise from one or more of the hereinafter mentioned causes".

34.2 In paragraph 1 of the notarial bond it is stated as follows:

"*The mortgager is truly and lawfully indebted and held and firmly bound unto and in favour of the Bank, its order and assigns and the security conferred by this bond to the Bank shall be in the sum of R4 000 000.00 (or any lesser amount that may be owing from time to time) (hereinafter referred to as the "capital sum") originating and arising from one or more of the causes or causae hereinafter referred to ...*"

34.3 Although the said notarial bond states that:

"*The respondent has become indebted to the applicant and is truly and lawfully "indebted" to the applicant the amount of indebtedness has not been reflected.*"

It was furthermore argued by Mr. Joseph that the Court should, in determining this aspect, take into account the fact that at the material time of the execution of the notarial bond on 9 November 2007 no indebtedness had arisen and furthermore that such indebtedness arose only after the loan agreement had been entered into on 6 December 2007.

34.4 The attention of this Court was drawn to the significance in the language used towards the end of paragraph 1 of the notarial bond where it is clearly stated that:

"*originating and arising from one or more of the following causes hereinafter referred to.*"

In this manner the notarial bond does not profess itself to be the origin, or the source, of the respondent's indebtedness. On the contrary it states quite clearly and convincingly that the source of the indebtedness is one or more or all of such causes it has referred to in paragraph 4 thereof. It provides as follows:

"4. The mortgager further agreed that this bond confer the security for and in respect of all amounts the mortgager may be owing to the bank during the currency of the bond by reason of one or more of the following causes or causae namely:

4.1 amounts owing be reason of a term loan granted by the bank to the mortgager in terms of which an amount to be advanced to the mortgager by the bank."

[35] I attach a high premium, as did counsel for the respondent, to the material difference the lawmaker has made when he legislated the provisions of s. 11(a)(i) "*in respect of which the period of prescription shall be 30 years in respect of any debt secured by a mortgage bond*" while in respect of s. 11(c) the period of prescription is "*6 years in respect of any debt arising from a negotiable instrument or notarial contract ...*"

[36] The paramount importance of the wording of the two subsections lies in the fact that, in terms of s. 11(a)(i) it is not necessary that the mortgage bond should be the source of the debt before the indebtedness of a debtor to a creditor may arise. The mortgage bond itself constitutes an independent origin of the debt and as such an independent cause of action. This will be the case even if the source or origin of the debt is a separate agreement. Such source will create the indebtedness of the debtor simply by virtue of the fact that it is secured by a mortgage bond. In respect of s. 11(c) it is clear

that the debt does not arise from, or does not have its origin from, a notarial agreement.

[37] Despite the employment in the notarial bond of such expressions that indicate the acknowledgement of the indebtedness of the respondent to the applicant, in view of the fact that no amount was lent and advanced by the applicant to the respondent on the basis of this notarial bond. It cannot be said that the notarial bond constitutes the source or origin of the debt. In my view, the use of the word such as "*arising from one or more of the causes*" set out in paragraph 4 and in paragraph 4.1 in particular, is decisive in establishing the source of the debt. A notarial bond cannot be regarded as a source of the debt if no loan or no money was advanced on its basis or if it evidences the existence of an independent source of the indebtedness.

[38] THE CLAIM ON THE BASIS OF SUBSCRIPTION AND SHAREHOLDERS AGREEMENT

The applicant contends that and the respondent has submitted that the applicant advanced a sum of R10 000 000.00 in terms of Subscription and Shareholders Agreement. The respondent refuses to refund the said amount of R10 000 000.00 because the amount advanced in terms of the said Subscription Agreement was subordinated in favour of the respondent's creditors and furthermore that the respondent was indebted to its creditors in the sum of R2,205,657.07. On that basis, the respondent contends that the said amount is not yet due and payable. On the other hand, while it

concedes, though indirectly, that the amount of R10 000 000.00 was subordinated to the respondent's other creditors, it holds the view that, because interest on the said amount of R10 000 000.00 was not subordinated and furthermore that the respondent did not dispute the amount of its liability in terms of the subscription agreement, the debt on 4 July 2011 being R16,311, 759.68, this application should succeed on the basis that the respondent is unable to pay interest.

[39] The argument by counsel for the applicant that a finding should be made against the respondent that it is unable to pay its debt because of its failure to pay interest does not have any merit. While the issue of interest and the subordination agreement were dealt with in case no. 14203/2010 by Blieden J on 15 October 2010, this was in the matter of **Absa Ltd v. Hammerle Group Pty Ltd**. In paragraph 12 of the said judgment, the court set out the respondent's case as follows:

"*(12) It is sub-clause 11.3.3 on which the respondent relies. It is its case that at the date of the applicant's demand for payment, as well as at all material times thereafter it had other creditors to whom claims were payable. In the circumstances because the applicant's claim is subordinated to this claim it is yet not payable.*"

The court then in paragraph 13 referred to the authority of **exparte De Villiers and Another N.O. v Carbon Development Pty Ltd (in liquidation) 1993(1) S.A. 493(A) at 505** per Goldstone JA:+

"15. Counsel for the applicant in response to the respondent's contention that the subordination agreement precludes the applicant from relying on this debt submits that the interest payments which are referred to in paragraph 11.3.1 are not subordinated to other creditor's claims, even if one accepts that the capital amount is subordinated to them. The amount of interest so due is R3,618,102.80.

16. In my view, this submission cannot succeed. A reading of clause 11.3 and particularly clauses 11.3.2.1; 11.3.2.2 and 11.3.4 (as underlined) makes it plain that what is repayable by the respondent to the applicant is "sixty equal monthly instalments which shall consist of the capital to repayment amount and interest as determined in 11.3.1 on the Absa Loan". It is these payments of capital plus interest which are subordinated to the claims of all other creditors as is made plain in paragraph 11.3.3 of the agreement. The interest payments cannot be separated from the capital in determining the debt due.

"*17. In the circumstances the respondent is correct in its contention that the amount claimed by the applicant under this heading is yet not payable or claimable by the applicant."*

[40] The said court order has since then not been challenged. I do not agree with the applicant's counsel's view. I do not have any reasons why I should dissent from the findings of the court *a quo* in this matter. In the result I find that the applicant cannot succeed with the application on this basis that the respondent is unable to pay interest chargeable on the capital amount of R10 000 000.00. I also accept the finding by Blieden J that the amount claimed in respect of Subscription and Shareholders Agreement is not yet claimable by the applicant. This is so because its enforceability was made subject to the fulfilment of a condition and that condition has not been fulfilled. See **exparte De Villiers and Another NNO in Re Carbon Developments 1993(1) S.A. 493 AD at p. 504.**

[41] THE RESPONDENT IS UNABLE TO PAY ITS DEBTS

In response to the letter in terms of s. 345 of the Companies Act 1973 by the applicant's attorneys to the respondents, the respondent's attorneys wrote back on 24 June 2011. In this letter they purported to convey to the applicant the respondent's inability to pay their debts including the amount due and payable to the applicant. At the same time they purported to convey to the applicant the respondent's proposal to settle their indebtedness to the applicant. To put it otherwise, they purported to convey to the applicants the respondent's proposals to compromise the applicant's claim against the respondents, on the ground that the respondent was in dire financial straits. In his heads of argument, counsel for the applicant had submitted that by the

said letter of 27 (sic) June 2011, the respondent had expressly, alternatively tacitly acknowledged its liability to the applicant in respect of the loan agreement and the subscription agreement. Relying on the terms of the said letter it was contended on behalf of the applicant that the respondent was unable to pay its debts.

[42] In support of the contention that the respondent's letter, in which it made an offer of settlement or requested time to pay, indicates insolvency, I was referred to some authorities:

President Scheepers SA v Tempest Clothing Company Ltd and Others 1976(2) S.A. 856 (W);

Absa v Reebokskloof (Pty) Ltd and Others 1993(4) S.A. 436 (C);

Langsto v Lamber 1948(4) S.A. 392 (W); and,

Redco (Pty) Ltd v Meyer 1988(4) S.A. 207 (E).

[43] The respondent challenges admissibility of the said letter on the grounds that it was written with a view to settle a dispute and on the basis furthermore that in accordance with the general principles the letter in its entirety would be privileged and on that basis inadmissible. At the hearing of the matter the respondent's counsel came armed with an application to strike out paragraph 78 and 79 of the applicant's founding affidavits; annexure "FA19" whose admissibility is challenged and paragraph 37.3 of the applicant's replying affidavit. It was argued on behalf of the respondent that the said letter does

not constitute an act of insolvency and that it is nothing more than a letter written without prejudice.

[44] "*Statements which are made expressly or impliedly without prejudice in the cause of bona fide negotiations for the settlement of a dispute cannot be disclosed in evidence.*"

See South African Law of Evidence by DT Zeffert; AP Paizes and A St.Q Skeen. The rationale behind this rule is to encourage people to try and settle their disputes without fearing that they may be held to their word if the negotiations fall through.

"*The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high) delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without fear that, if the negotiations fail, any admissions made by them during such discussions would be used against them in the ensuing litigation.*" See Naidoo v Marine and Trade Insurance Company Ltd 1978(3) S.A. 666 (A) at 677 B-C; De Beers Consolidated Mines Ltd v Ettling 1906 TS 420; Brauwer v Markow and Another 1946 TPD 344 and Hoffend v Elgetti 1949(3) S.A. at 10A.

[45] In terms of the authorities of Milward?? v Glaser 1950(3) S.A. 547(W) at 554 and Gcabashe v Nene 1975(3) S.A. 912D at 914E, if a statement constitutes part of *bona fide* negotiations for a compromise or settlement of a dispute, such statement will remain privileged irrespective of the absence or presence

of the words "without prejudice" in the means of communication. In paragraph 4 of the said letter dated 24 June 2004 it was stated on behalf of the respondents that:

"*Our client has always indicated that it would like to make settlement proposals.*"

I have not been referred to any correspondence in which the respondent always indicated its preparedness to make a settlement. The applicant has not disputed this averment and accordingly I will accept that there was always a *bona fide* attempt by the respondent to settle the dispute between the parties. Now the relevant paragraphs of the said letter dated 24 June 2011 from the respondent's attorneys to the applicant's attorneys have been blacked out. Finally, I found that the letter dated 24 June 2011, Annexure "FA19" to the founding affidavit, contains statements that render it inadmissible. Any reference to it should, in my view, be struck from the papers.

[46] Accordingly I make the following order:

(1) The application for the rectification of clauses 2.1.2 of the loan agreement concluded between the applicant and the respondent on 6 December 2006 is hereby granted.

(2) The application by the respondent to strike out:

2.1 paragraphs 78 to 79 of the founding affidavit;

2.2 annexure "FA19" to the founding affidavit;

2.3 paragraph 37.3 of the replying affidavit

is hereby granted.

(3) The application to liquidate the respondent is hereby dismissed with costs, which costs shall include the costs of two counsel.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for applicant:	*Adv. FH Terblanche (SC)*
	Adv. J Janse van Rensburg
Instructed by:	*Tim du Toit & Co Inc.*
Counsel for respondents:	*Adv. SL Joseph (SC)*
	Adv. H Fischer
Instructed by:	*DMS Attorneys c/o Van Stade Van der Ende Inc*
Date Heard:	*12 November 2013*
Date of Judgment:	*20 December 2013*